83-327

No. .....

In the

Supreme Court of the United States

OCTOBER TERM 1983

DON HALSELL,

Petitioner,

v.

LOCAL UNION NO. 5, BRICKLAYERS & ALLIED CRAFTSMEN; TEXAS STATE CONFERENCE OF THE BRICKLAYERS & ALLIED CRAFTSMEN; INTERNATIONAL UNION OF BRICKLAYERS & ALLIED CRAFTSMEN,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Whether a union member is entitled, under section 101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959, to "constitutionally reasonable" prior notice of the conduct that may subject the member to fine or expulsion by the union.

LIST OF PARTIES

1. DON HALSELL

2. LOCAL UNION NO. 5, BRICKLAYERS & ALLIED CRAFTSMEN

3. TEXAS STATE CONFERENCE, BRICKLAYERS & ALLIED CRAFTSMEN

4. INTERNATIONAL UNION OF BRICKLAYERS & ALLIED CRAFTSMEN

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* Because the appeal was decided under Fifth Circuit Local Rule 21, the opinion serves as the Court's judgment.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 706 F.2d 313 (5th Cir. 1983). The opinion of the District Court is reported at 530 F. Supp. 803 (N.D. Tex. 1982).

JURISDICTION

The opinion of the Court of Appeals was issued on May 5, 1983. The Court denied Halsell's Petition for Panel Rehearing on June 1, 1983. This petition for certiorari was filed within ninety days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(5) ("the Act"): "No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues . . . unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

STATEMENT OF THE CASE

Halsell, at the time a member for more than twenty-five years of the Bricklayers & Allied Craftsmen ("BAC"), was asked in the summer of 1977 to teach a bricklaying class for duly indentured bricklaying apprentices at Skyline High School in Dallas, Texas. The job was to be a temporary one, lasting only until a fulltime instructor could be engaged. Funding for the class came in part from the sponsor of the class, an association of nonunion masonry contractors, in part from the Dallas Independent School District and the federal government, and in part from the apprentices themselves. Shortly after he began teaching the class, Halsell was charged by the Dallas local of the BAC with violation of the International Constitution, Code 5, paragraph 1(s), which states:

> It shall be an offense against the International Union . . . for any member . . . to commit any act which is

seriously detrimental to the interests of the International.

Trial of the charge before a union tribunal resulted in imposition of a $250.00 fine. Halsell appealed the fine without sucess to the Texas State Conference of the BAC and to the International, then filed suit in the District Court under 29 U.S.C. § 412. Among other things, he contended that the fine violated § 101(a)(5) of the Act because he did not have reasonable *prior* notice that his conduct — teaching a bricklaying class — could subject him to union discipline. The District Court declined to consider whether Halsell had received such notice because it read this Court's decision in *Boilermakers v. Hardeman*, 401 U.S. 233 (1971), to hold that the Act does not entitle union members to prior notice of conduct for which they may be fined or expelled. 530 F. Supp. at 807; *supra* at A-8. The Court of Appeals summarily affirmed, citing *Hardeman*. 706 F.2d 313; *supra* at A-1.

REASONS FOR GRANTING THE WRIT

1. THE DECISIONS OF THE LOWER COURTS MISCONSTRUE THIS COURT'S *HARDEMAN* DECISION SO AS TO DENY UNION MEMBERS A FUNDAMENTAL DUE PROCESS RIGHT GUARANTEED THEM BY THE "UNION MEMBERS' BILL OF RIGHTS," SECTION 101(a) OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, 29 U.S.C. § 411(a)—*PRIOR* NOTICE OF CONDUCT FOR WHICH THE MEMBER MAY BE FINED OR EXPELLED BY THE UNION.

This Court, in the course of deciding *Boilermakers v. Hardeman*, *supra*, made these two statements:

1. "[A] union may discipline its members for offenses not proscribed by written rules at all . . . [so] it is surely a futile exercise for a court to

construe the written rules in order to determine whether particular conduct falls within or without their scope." 401 U.S. at 244-45.

2. "[T]he notice [of the charges against Hardeman] appears to have contained a detailed statement of the facts relating to the fight that formed the basis for the disciplinary action. Section 101(a)(5) requires no more." 401 U.S. at 245 (footnote omitted).

The District Court and the Court of Appeals construed the quoted statements as a holding that the Act does not grant union members *any* right to *prior* notice of the behavior for which they may be fined or expelled. That construction could only be arrived at, however, by disregarding both the full legislative history of the Act and the facts and actual holding of *Hardeman*.

1. *The Act. Hardeman* discusses some pertinent history of the Act. It notes that the present language of section 101(a)(5) was substituted for a requirement that union discipline be based only on "breach of a published written rule . . ." and that the change was intended to create a standard of "constitutionally reasonable notice. . . ." 401 U.S. at 243-44. There is, however, in the legislative history not the slightest suggestion that Congress intended the "constitutionally reasonable notice" standard to exclude a requirement of fair *prior* notice of prohibited conduct. Such prior notice had been recognized as an integral part of constitutional due process long before 1959. *See, e.g., Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Connally v. General Constr. Co.*, 269 U.S. 385 (1926). Moreover, a principal purpose of the Act was precisely to prevent the improper use of vague union disciplinary rules. Senator McClellan explained:

> I wish Senators to listen to what a member of some unions can be expelled for or punished for. How would Senators like to be tried under such a general policy as I am about to read . . . 'Good standing in a union can

> be lost for a variety of reasons so broad or vague and uncertain as to be subject to abuse and discriminatory application.' . . . [U]nder some union constitutions a union has the power to suspend or expel a member on such grounds as 'engaging in conduct unbecoming a union member.' What does that mean?

105 Cong. Rec. 6477-78 (1959); II LEGISLATIVE HISTORY OF LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 1104. It is for that reason alone highly improbable that the compromise by which "constitutionally reasonable notice" replaced the requirement of discipline only for violation of a "published written rule" was intended to legitimize discipline without reasonable *prior* warning of what constituted punishable behavior.

There is, moreover, a much simpler, and more accurate, explanation of the compromise. The examples of union member misconduct used by opponents of the original bill—murder, rape, embezzlement, and bribery, 105 Cong.Rec. 6491, A3293-4 (1959) — are all serious violations of criminal law. In other contexts, such as public employment, criminal conduct has often been analyzed, for due process "fair notice" purposes, as "carry[ing] with it its own warning. . . ." *Shawgo v. Spradlin*, 701 F.2d 470, 478 (5th Cir. 1983); *Parker v. Levy*, 417 U.S. 733, 757 (1974) ("no reasonable doubt" that publicly encouraging enlisted men not to go to Vietnam would subject plaintiff to military discipline; vagueness challenge to "catchall" prohibition rejected); Note, *Constitutional Law—Vagueness Doctrine — Police Departmental Regulation Proscribing "Conduct Unbecoming an Officer" is Void for Vagueness*, 53 TEXAS L. REV. 1298, 1305 & n.43 (1975) ("hardcore" misconduct viewed as precluding vagueness challenge). *Cf. Smith v. Goguen*, 415 U.S. 566, 578 (1974) ("hardcore violator concept" may preclude vagueness challenge where statute applies "without question to certain activities."). With the amendment to the Act Con-

gress obviously intended to permit unions to discipline their members without a "published written rule" if the conduct was "hardcore" and so "carried with it its own warning." Senator Goldwater, as quoted in *Hardeman*, was thus technically correct that section 101(a)(5) does not *require* that *all* disciplinary charges "be based on activity that the union had proscribed prior to the union member having engaged in such activity." 401 U.S. at 244.

It is vital to remember, though, that at the time Senator Goldwater made the statement quoted in the text he was attempting to persuade a House Committee to *reject* the Senate bill containing section 101(a)(5). *Labor-Management Reform Legislation, Hearings before a Joint Subcommittee of the House Committee on Education and Labor*, 86th Cong., 1st Sess., pt. 4, p. 1593 (1959) ("The present bill, in my opinion, cannot and will not achieve what it promises. This afternoon, in brief form, I shall discuss the bill pointing out some of its more serious defects.") Goldwater *alone* voted *against* the Senate bill. Thus, it cannot be accepted that the Senator's after-the-fact comment was a fair characterization of the pre-passage understanding of the Senate as a whole, rather than a deliberate overstatement for polemical effect.

> [W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach.

NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 66 (1964).[1] In contrast, Senator McClellan, a *supporter* of the bill, who this Court in *Hardeman* stated testified before the Committee "to the same effect" as Senator Goldwater,

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[1] *Accord, Holtzman v. Schlesinger*, 414 U.S. 1304, 1312-13 n.13 (1974) (per Marshall, Circuit Justice) ("well established that speeches by opponents of legislation are entitled to relatively little weight in determining the meaning of the Act in question."); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203-04 n.24 (1976); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).

401 U.S. at 244, in fact made no statement whatever about the prior notice issue at the pages cited in *Hardeman* or elsewhere, except to reemphasize the "usual reasonable constitutional basis" language of Senator Kuchel. *Labor-Management Reform Legislation, Hearings before a Joint Subcommittee of the House Committee on Education and Labor*, 86th Cong., 1st Sess., pt. 5, pp. 2235-36, 2251, 2285 (1959).

The understandings of the two Senators are reconcilable. "Hardcore" misconduct — murder, rape, bribery, embezzlement, and their equivalents — could be, under the amendment to the Act, as it always had been, punished consistently with "constitutionally reasonable notice" without a "published written rule" forbidding it. Senator Goldwater, the advocate in opposition, understandably did not emphasize the constitutional limits of the ability to discipline without prior warning; he wanted a stronger bill. Senator McClellan, on the other hand, a supporter of the Senate bill, emphasized the *full* standard: "constitutionally reasonable" discipline.

Petitioner urges the Court to consider the legislative history of the Act. Nothing in that history, including the excerpts cited in *Hardeman*, is inconsistent with requiring unions to discipline members on a "constitutionally reasonable basis" — *i.e.* with fair prior notice of the behavior for which they may be fined or expelled, either from a reasonably clear written rule or because their conduct "carries its own warning."[7]

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[7] The arguments of the unions to the contrary notwithstanding, the *idea* of prior notice of prohibited conduct in union disciplinary proceedings is hardly antithetical to national labor policy. In *Booster Lodge No. 405, IAM v. NLRB*, 412 U.S. 84 (1973), this Court held that a union could not validly fine a member who resigned from the union during a strike in the absence of fair advance warning that such conduct was punishable. *Id.* at 89. In *NLRB v. Merrit Graham Lodge No. 1871, IAM*, 575 F.2d 54 (2d Cir. 1978), the Court, following *Booster Lodge*, rejected the union's arguments, first, that "any reasonable union member would know that the act of resigning during a strike would injure the union

2. *Hardeman.* The painful irony in the holdings of the lower courts that *Hardeman* precludes a lack-of-prior-notice challenge to union discipline stems from two facts: (i) the conduct disciplined in *Hardeman* — assault and battery of a union official, 401 U.S. at 236 — was "hard-core" by anyone's standard, *and* (ii) the union had a specific "published written rule" forbidding such conduct. 401 U.S. at 236 & n.4. In short, a *prior* notice issue was simply not present in *Hardeman.*

It is telling that the author of a recent, tightly-reasoned article advocating the application of facial vagueness and overbreadth analysis to union disciplinary rules did not find it necessary even to cite *Hardeman.* Note, *Facial Adjudication of Disciplinary Provisions in Union Constitutions*, 91 YALE L.J. 144 (1981). Another respected commentator on the rights of union members noted, and deplored, "*Hardeman*'s overly generous attitude toward vague or even unwritten union rules" without suggesting in the least that the decision stood as a barrier to the development of "a mechanism to ensure that only willing and informed members subject themselves to the possibility of union discipline." Wellington, *Union Fines and Workers' Rights*, 85 YALE L.J. 1022, 1030, 1052 (1976). The only conclusion drawn by this Court in *Hardeman* concerning the legislative history was that:

> We think this is sufficient to indicate that § 101(a)(5) was not intended to authorize courts to determine the *scope of offenses for which a union may discipline its members.*

401 U.S. at 244 (emphasis added). What conduct a union may punish, and the procedural limitations the union must respect in imposing such punishment, are questions

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and would call for sanctions," *id.* at 55, and second, that a provision of the union's constitution prohibiting "other conduct unbecoming a member" gave adequate notice. *Id.* The Court found the constitutional provision "too vague" to support a disciplinary fine. *Id.*

logically and legally distinct. *See Facial Adjudication*, 91 YALE L.J. at 162-63 & nn.93, 94.

Some of the legislative history cited in *Hardeman* offers a starting point for analysis of the due process issue raised by Petitioner, but it cannot be asserted on a principled basis that the *holding* in *Hardeman* addressed, much less decided, that issue.

2. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF TWO OTHER COURTS OF APPEALS

Two post-*Hardeman* decisions of Courts of Appeals conclude that a union member is entitled, under section 101(a)(5) of the Act, to constitutionally reasonable prior notice of the conduct for which he may be expelled or fined. *Semancik v. United Mine Wrkrs*, 466 F.2d 144, 157 (3d Cir. 1972); *Perry v. Milk Drivers' and Dairy Employees' Union, Local 302*, 656 F.2d 536, 539 (9th Cir. 1981). Neither *Semancik* nor *Perry* can be explained as decisions that simply overlook *Hardeman*. The pertinent reasoning of *Semancik* is based heavily on *Hardeman* and *Perry* cites *Hardeman* immediately before citing *Semancik*.

The decision of the Court of Appeals here, affirming the District Court's refusal to consider whether Halsell received reasonable prior notice that teaching a bricklaying class could result in a union fine, thus conflicts with the holdings of *Semancik* and *Perry*, although it probably represents the majority view in its misreading of *Hardeman*.[3]

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[3] *See e.g., Kuebler v. Cleveland Lithographers & Photo. Union*, 473 F.2d 359, 363-64 (6th Cir. 1973); *Strom v. National Ass'n of Basketball Referees*, 564 F. Supp. 250, 253-54 & n.7 (E.D. Pa. 1983); C. SUMMERS & R. RABIN, THE RIGHTS OF UNION MEMBERS 37-38 (1979). *See also* T. KEELINE, NLRB AND JUDICIAL CONTROL OF UNION DISCIPLINE 58-59 (1976) (recommending that if the Court's statement in *Hardeman* constitutes a holding that Congress did not intend union members to have fair prior warning of prohibited conduct, "abandonment of this concept by Congress and the Court is desireable.")

III.

CONCLUSION

Congress guaranteed to union members "constitutionally reasonable notice" in union disciplinary proceedings. Senator Kuchel specifically noted, in defending the bill against criticisms like Senator Goldwater's, that:

> We believe that the U.S. district court will be able to determine whether the rights of the union member have been protected and whether he has had constitutionally reasonable notice and a reasonable hearing, and whether the matter has been reasonably disposed of.

105 Cong.Rec. 6023-25 (1959). Abuses of union disciplinary procedures are epidemic, and most are perpetrated under the cover of catch-all rules like Code 5, section 1(s) of the BAC's Constitution. *Facial Adjudication*, 91 YALE L.J. at 148-149 & nn.24-32; *id.* at 166 ("a provision such as that prohibiting actions 'contrary or detrimental to' the interests of the union is particularly problematic. . . ."); T. KEELINE, *supra*, at 88 & n.12. It is, moreover, not the corrupt union vice-president or the union president convicted of bribery that feels the weight of these provisions: discipline is reserved for the rank-and-file dissident, the reformer, the independent member willing and able to stand up to union officialdom. Don Halsell may not be a "typical" union member, but the typical member, as reflected by the relative scarcity of precedent under the Act, is usually too intimidated to protect his rights. *See Facial Adjudication*, 91 YALE L.J. at 159 & nn.77-78. Such timidity is well-founded, because courts unwilling to look further than the surface emanations of *Hardeman* make it possible for unions to discipline members not just for *whatever* they please but also *however* they please. Local 5 could have made matters easier for itself here by simply charging Halsell with, and fining him for, being named Don Halsell: under the view adopted by

the lower courts the charge itself constitutes both "constitutionally reasonable notice" and a final and binding determination that such a name is "seriously detrimental to the interests of the International."

Neither *Hardeman* nor national labor policy requires that union members be subject to fine or expulsion at the unrestrained whim of union officialdom. Obviously a potent weapon to enforce conformity, "catch-all" disciplinary provisions most often are the means of fining or expelling members, as with Halsell, not for actions the union could not reasonably anticipate in drafting its rules of conduct or for criminal conduct that "carries its own warning," but rather for completely legitimate activities that the union dares not explicitly prohibit. The Court should make clear that its decision in *Hardeman* did not construe the Act to permit this abuse of a union's disciplinary powers.

For the reasons set forth in this petition, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals. Without hearing oral argument, this Court should reverse and remand the case to the Court of Appeals for a decision as to whether Halsell received "constitutionally reasonable" *prior* notice that teaching a bricklaying class could result in a union fine. Alternatively, the writ should be granted and the matter set for oral argument in the regular course.

Respectfully submitted

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1. Opinion of the Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1127

DON HALSELL,

Plaintiff-Appellant,

versus

LOCAL UNION NO. 5, BRICKLAYERS & ALLIED CRAFTSMEN; TEXAS STATE CONFERENCE OF THE BRICKLAYERS & ALLIED CRAFTSMEN; INTERNATIONAL UNION OF BRICKLAYERS & ALLIED CRAFTSMEN,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

(May 5, 1983)

Before CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 21. United Steelworkers of America v. Sadlowski, U.S. , 102 S.Ct. 2339 (1982); International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO v. Hardeman, 401 U.S. 233 (1971).

2. Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DON HALSELL VS. LOCAL UNION NO. 5, BRICKLAYERS & ALLIED CRAFTSMEN; TEXAS STATE CONFERENCE OF THE BRICKLAYERS & ALLIED CRAFTSMEN, and INTERNATIONAL UNION OF BRICKLAYERS & ALLIED CRAFTSMEN	CA3-79-0927-C

OPINION

Plaintiff seeks to protect rights afforded by our federal labor laws, specifically those contained in 29 U.S.C. § 411(a)(1), (2), (4) & (5).[1] Jurisdiction in this Court is founded upon 29 U.S.C. §§ 185(c) and 412.[2]

[1] 29 U.S.C. § 411(a)(1), (2), (4) & (5) read:

(a)(1) Equal rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws. [cont.]

[2] 29 U.S.C. § 185(c) reads:

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Plaintiff is a member in good standing of Local Union No. 6, Bricklayers & Allied Craftsmen. Local 6's parent organizations are Defendants Texas Conference and International.

Though a union bricklayer, Plaintiff has not made his living by laying bricks for about 20 years. He is a brick contractor and Chief Executive Officer of the Brick Institute of Texas.

[cont.] (2) Freedom of speech and assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(4) Protection of the right to sue.—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against improper disciplinary action.—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Apparently, Plaintiff hires only union bricklayers so he has not had difficulties because he is a brick contractor.

But his position as the head of the Brick Institute of Texas has created problems. The Brick Institute is a trade organization of brick manufacturers. It, of course, wishes to promote the sale and use of brick construction in the State of Texas, regardless of whether the layers are union or non-union.

In August, 1969, Plaintiff, who was then employed by the Brick Institute, got into a dispute with Bricklayers Union Local No. 9 in Waco, Texas, over the training of non-union bricklayer apprentices. This dispute was ultimately settled by the parties while suit was pending in Federal District Court in Waco.

This incident is important presently only because it goes to show that Plaintiff because of his position with the Brick Institute has had differences with his fellow union members for many years.

In the fall of 1977, Plaintiff was approached to help find a teacher for an apprenticeship class at Skyline High School, Dallas, Texas. Plaintiff agreed to help find a teacher and also agreed to fill in as the teacher (for pay) until a permanent instructor could be found. This apprenticeship class was sponsored by an association of open shop contractors.

On November 3, 1977, Mr. William R. Shrum, Business Manager of Defendant Local 5, observed Plaintiff at Skyline High School where he was teaching the open shop class. Mr. Shrum subsequently charged Plaintiff with a violation of Code 5, Code of International Offenses, Paragraph 1(s) of the Constitution of Defendant International. Code 5(1)(s) provides:

> (1) It shall be an offense against the International Union:

> . . . (s) For any member or affiliate to commit any act which is seriously detrimental to the interests of the International.

A trial was subsequently held on November 30, 1977, by Defendant Local No. 5. Just what happened at that trial is subject to dispute but is clear that Plaintiff admitted that he was teaching the open shop apprenticeship class on November 3, 1977. He was found guilty and fined $250. A tape recording of that trial was made but that tape was subsequently erased.

Plaintiff was formally notified of the guilty decision and the fine of $250 in a letter from Mr. Shrum dated December 1, 1977. Plaintiff then paid his fine under protest by a check dated December 15, 1977.

On December 23, 1977, Plaintiff sent a letter to Mr. Y. C. O'Glee, President of Defendant State Conference, that stated that the appeal procedures were not clear to him and asking for guidance. He received his answer in a letter from Mr. O'Glee, dated January 9, 1978, to the financial secretary of Bricklayers Local 6 which was also sent to Plaintiff. That letter informed Plaintiff that he had to pay his fine under protest and appeal within 30 days from his trial date. Though Plaintiff was past the 30-day mark, both Defendant State Conference and Defendant International accepted his appeals, in turn. It goes without saying since this suit was filed that his appeals were denied.

As no appeal had been received within the 30-day period, Mr. Shrum had erased the tape before the appeal was filed. Defendant Local 5 has maintained throughout that Plaintiff never exhausted his union remedies because of his late appeal. This might have been a viable argument had not the other Defendants heard the appeals.

Plaintiff complains that his rights under 29 U.S.C. § 411(a)(5)(C) have been violated because he was not

provided a transcript of his trial. Though it would be best if a transcript were available, there has been no showing of any fault on the part of any Defendant for the failure of Plaintiff to receive a transcript. If anything, the unavailability of a transcript was caused by Plaintiff's confusion as to appeal procedures which are set out in Code 6 of the Constitution of Defendant International.[3]

Plaintiff contends that that hearing was not "a full and fair hearing" as required by 29 U.S.C. § 411(a)(5)(C). There were substantial differences in the accounts of the Defendant Local 5 trial between Plaintiff and the witnesses presented by the Plaintiff [sic]. One of the chief complaints of Plaintiff is that Mr. Shrum was present at the trial. But Code 6(2)(f)(i) of Defendant International requires the presence of the charging party at a subsequent trial.

Plaintiff's real complaint about the conduct of the trial is the same complaint under 29 U.S.C. § 411(a)(5)(A) that he has about the written charge upon which he was tried and his complaint under 29 U.S.C. § 411(a)(2) that his Right of Free Speech has been violated by the Defendants.

Plaintiff has the view (which coincides with the Brick Institute's view) that anyone who shows an interest in bricklaying should be allowed to become a fully trained journeyman bricklayer. This, to say the least, is not the view of his co-unionists. As would seem natural, they believe that the number of bricklayers be limited to ensure full employment for the present bricklayers, whom they prefer to be union bricklayers. With this in mind, the

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[3] Code 6(3)(C)(i) provides:

> A charged or charging party wishing to appeal must file a notice of appeal by registered or certified mail within 30 days from a trial body's or appellate body's written notice of decision. A copy of the notice of appeal shall be sent by registered or certified mail to the opposing party.

position of Defendants has been and is that there should only be one apprentice for each three journeymen bricklayers. As a corollary of this, Defendants position is that apprenticeship programs should be run under the union's apprenticeship program so that the graduates will be (1) limited in number and (2) union members.

The testimony of Defendants' witnesses was that union members are not allowed to teach apprenticeship classes that are not sanctioned by the union. Plaintiff disputed this by way of the example of a union member who was teaching a non-union sanctioned bricklaying class in a public high school. Defendants witnesses rebutted that this was not an apprenticeship class which qualified a person to be a bricklayer. This testimony was not substantially rebutted. So Plaintiff's equal rights challenge under 29 U.S.C. § 411(a)(1) must fail.

There was no testimony at the trial before this Court to the effect that this equal rights defense was presented by Plaintiff at Defendant Local 5's trial.

Apparently, when Plaintiff showed up for the union trial, he readily admitted that he had taught the apprenticeship class on November 3, 1977, that was sponsored by an association of open shop contractors and not by the union. There were vast differences in the testimony before the Court as to what then happened at the union trial. But all witnesses were in agreement that no further testimony was taken.

Now, we have come down to the rub in this case. Plaintiff contends that the written charge filed by Mr. Shrum should have spelled out just how his conduct was "seriously detrimental to the interests of the International," and that testimony should have been presented at his union trial which would show the serious detriment to the union. He also contends that this provision of Defendant Union's Constitution is vague and overbroad.

As the Fifth Circuit pointed out in *Davis v. Williams*, 617 F.2d 1100, 1103 (1980), cert. den. 449 U.S. 937, 101 S.Ct. 336, 66 L.Ed.2d 160, vagueness is a due process consideration and overbreadth is a first amendment ground consideration and they do overlap. In *Davis*, the Fifth Circuit found that a review of provisions such as "seriously detrimental to the interests of the International, supra," entails "meticulous analysis and balancing" which that Court preferred to leave to the Supreme Court.[4]

The Supreme Court spoke as to these matters quite clearly in *Boilermakers v. Hardeman*, 401 U.S. 233, 91 S.Ct. 609, 28 L.Ed.2d. 10. The Court said that it was up to the unions, not the Courts, to define the conduct which would lead to disciplinary conduct. In *Hardeman*, the Court approved a charge that specified the provision with which Mr. Hardeman was charged and a statement of the facts of the incident that led to the charge upon which Mr. Hardeman was tried. The Court found that this was all that 29 U.S.C. § 411(a)(5) requires.

Mr. Shrum's charge both recited the provision of Defendant International's Constitution which Shrum was charging Plaintiff had violated and the facts of the incident involved. So the charge was in accord with Federal law.

That leaves us with the question of what testimony had to be presented at Plaintiff's trial for a finding of guilt to be proper. Plaintiff maintains that explicit evidence that would tend to show that his teaching of an open shop apprenticeship class was "seriously detrimental" to the interests of Defendant International. Defendants demur. Here we are back to Plaintiff's long standing dispute with his co-unionists.

It is apparent from reading the Supreme Court's opinion in *Hardeman*, supra, that no evidence was presented at

[4] Supra, p. 1104.

Mr. Hardeman's union trial other than testimony concerning the facts and circumstances of the incident involved. This would seem to be true in the usual case and ordinarily end our inquiry.

In the present case, Plaintiff has raised a free speech claim under 29 U.S.C. § 411(a)(2). His claim is, essentially, that the charge trial and $250 fine have been used in an attempt to silence what he considers to be his opposition to the viewpoint espoused by the part of his union that is in control of the union offices. The Court will not, on the whole, get into this squabble. Plaintiff does not claim that any officer of any local, Defendant Conference or Defendant International was not duly elected. So the only assumption that can be made is that the officers speak for the membership.

Plaintiff's contention is not so much that he did not know that the Defendants would look upon his teaching an open shop apprenticeship class with such disfavor as it is that he disagrees with their position and has the right to espouse his disagreement.

Undoubtedly, he has a right to voice his opinions either verbally, in writing or through symbolic acts.

The Fifth Circuit has held that the free speech rights of union members may be limited in three ways. Those three are:

> (1) Reasonable rules pertaining to conduct of meetings; (2) reasonable rules as to the responsibility of every member toward the union as an institution; and (3) reasonable rules requiring members to refrain from conduct interfering with the union's performance of its legal contractual obligations.[5]

The second listed limitation is the one pertinent to our inquiry.

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[5] *Airline Maintenance Lodge 702, I.A.M. & A.W. v. Loudermilk*, 444 F.2d 719, 721 (1971).

Airline Maintenance Lodge 702 v. Loudermilk,[6] is the case cited by Plaintiff that is the closest to his own situation as far as "reasonable rules" go.

In *Airline Maintenance Lodge 702 v. Loudermilk*, the union had fined Mr. Loudermilk for joining and becoming president of a rival union. The Fifth Circuit said that this was improper though the union could have legally expelled him. Mr. Loudermilk's situation was that he was an employee of an airline which had a union shop agreement with the union that had fined him. The union shop provision of that contract was allowed by § 2 Eleventh of the Railway Labor Act, 45 U.S.C. § 152 Eleventh.[7] The Fifth Circuit's reasoning was that Mr. Loudermilk had been compelled to join Airline Maintenance Lodge 702 which he was trying to replace with another union and that this had free speech overtones so the fine was improper. The difference between the fine imposed and the expulsion that could have been imposed was the last part of § 2 Eleventh which says, in essence, that Mr. Loudermilk could have kept his job with the airline if he had been

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[6] Ibid.

[7] 2. Eleventh. Notwithstanding any other provisions of this chapter, * * * any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of employment, that within sixty days following the beginning of such employment * * * all employees shall become members of the labor organization representing their craft or class: *Provided*, that no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employees to tender periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

expelled for joining another union and becoming its president. So explusion would have harmed him not, where the fine harmed him economically.

Plaintiff's situation is far different. He does not lay bricks for a living. There is no showing that the Brick Institute of Texas requires him to be a member of any union, let alone Defendant International. No evidence has been presented that Plaintiff's entry into the union was anything other than completely voluntary. Lastly, Plaintiff is a resident of a "Right to Work" state[1] and not covered by a law such as the Railway Labor Act, 45 U.S.C.A. § 152 Eleventh which allows union shops.

This lack of coercive membership tips the balance in favor of the Defendants. Plaintiff's conduct in teaching the open shop apprenticeship class may have had some free speech elements in it. But there has been no showing that Plaintiff undertook to teach that class for any reason other than to maintain good relations with members of the industry because of his position with the Brick Institute of Texas.[2]

In summation, procedurally, Plaintiff's union trial could have been handled better by Defendant Local 5. Assumably, a new trial could be ordered to clear up any inadequacies in procedure. But in light of the burdens of going forward with evidence and proof that are required and Plaintiff's willing admission to have taught the open shop apprenticeship class as charged, the result would not differ. Therefore, judgment will be entered for the Defendants.

/s/ W. M. TAYLOR, JR.
United States District Judge

DATE: January 28, 1982

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[1] Vernon's Ann. Civ. St. Art. 5207a.

[2] Apparently, Plaintiff was paid for teaching the class but did not appear to be much of a motivation as Plaintiff was only supposed to teach until another qualified instructor was found.

3. Order on Petition for Panel Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1127

DON HALSELL,

Plaintiff-Appellant,

versus

LOCAL UNION NO. 5
BRICKLAYERS & ALLIED CRAFTSMEN, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(June 1, 1983)

Before CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ CHARLES CLARK
Chief Judge

CERTIFICATE OF SERVICE

This is to certify that on this day of August, 1983, three copies of the foregoing Petition were served upon Appellees by placing same in the United States Mail, postage prepaid, addressed to their respective attorneys of record:

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BENNETT W. CERVIN

No. 83-327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DON HALSELL,

Petitioner,

VS.

LOCAL UNION NO. 5, BRICKLAYERS & ALLIED CRAFTSMEN; TEXAS STATE CONFERENCE OF BRICKLAYERS & ALLIED CRAFTSMEN; INTERNATIONAL UNION OF BRICKLAYERS & ALLIED CRAFTSMEN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF THE INTERNATIONAL UNION AND TEXAS STATE CONFERENCE

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IN THE

Supreme Court of the United States

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No. 83-327

DON HALSELL,

Petitioner,

VS.

LOCAL UNION NO. 5, BRICKLAYERS & ALLIED CRAFTSMEN; TEXAS STATE CONFERENCE OF BRICKLAYERS & ALLIED CRAFTSMEN; INTERNATIONAL UNION OF BRICKLAYERS & ALLIED CRAFTSMEN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF THE INTERNATIONAL UNION AND TEXAS STATE CONFERENCE

STATEMENT OF THE CASE

Petitioner Don Halsell has been for many years Chief Executive Officer of the Brick Institute of Texas, a trade organization of brick manufacturers. While he has also been, for over twenty-five years, a member of one or another local affiliated with the International Union of Bricklayers and Allied Craftsmen and the Texas State Conference of Bricklayers & Allied Craftsmen (hereafter "the Unions"), he "has not made his living by laying bricks for

about 20 years." Appendix to Petition for Writ of Certiorari ("Pet.App."), A-3.

The Brick Institute of Texas wishes to promote the sale and use of brick construction . . . regardless of whether the layers are union or non-union." Pet.App.A-4. The Unions, on the other hand, have, as petitioner himself testified at trial, a goal of "promot[ing] union shop jobs"—that is, ensuring that so far as possible all bricklaying jobs are performed by union members. Tr.87. For this reason, as petitioner also acknowledged, the unions have traditionally declined to teach bricklaying skills to "anybody that comes along" (Tr. 93), preferring instead "that apprenticeship programs should be run under the union's apprenticeship program so that the graduates will be (1) limited in number and (2) union members." Pet.App.A-7. On at least one occasion previous to the present one petitioner was involved in a dispute with another Bricklayers' local over the training of non union apprentices. Pet.App.A-4.[1]

Despite his awareness of the Union's position on apprenticeship training, petitioner began teaching bricklaying skills to a group of "open shop" apprentices—that is, individuals who worked during the day for non-union contractors—at a time when a parallel class of union apprentices sponsored by a Bricklayers' local was being conducted at the same time in the same high school building. Tr.115. For doing so he was charged with and fined for violating Code 5

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[1]In addition, petitioner knew that the Texas State Conference Constitution prohibited members from "further[ing] the interests of firms, corporations, manufacturers, public or private schools by teaching laborers, convicts, or any person other than regularly indentured apprentices the trade of masonry." Pl.Ex.44.

§ 1(s) of the International Union Constitution, the provision he now seeks to challenge.[2]

Throughout this litigation petitioner has conceded that he in fact taught the non-union apprenticeship class as charged. He contends, however, that under § 101(a)(5) of the Landrum-Griffin Act, 29 U.S.C. § 411(a)(5), the union had an obligation to provide explicit prior notice, in writing, of the basic union creed that taking actions which render the employment prospects of union members less secure and their ability to maintain their wages and working conditions more vulnerable to non-union competition is "seriously detrimental" to union interests.

The District Court rejected petitioner's prior notice argument. The Court of Appeals affirmed without opinion, and without expressing its agreement or disagreement with the District Court's reasoning. Instead, the Court of Appeals merely cited in support of its holding two opinions of this Court, *Boilermakers v. Hardeman*, 401 U.S. 233 (1971), and *Steelworkers v. Sadlowski*, 457 U.S. 102 (1982).[3]

ARGUMENT

1. *Boilermakers v. Hardeman*, 401 U.S. 233 (1971), squarely addressed and decided the very contention petitioner raises, in a closely analogous factual context. In

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[2]The section provides that "it shall be an offense . . . for any member . . . to commit any act which is seriously detrimental to the interests of the International."

[3]The *Sadlowski* citation was apparently in response to an argument petitioner has now abandoned—that the act of teaching a non-union apprenticeship class is protected under the free speach provisions of the Landrum-Griffin Act.

Hardeman, a union member who assaulted an officer was charged with and convicted of violating two different provisions of the union constitution. One expressly prohibited force against union officers; the other, quite similar to the provision here at issue, generally proscribed acts which "create dissension among the members or . . . work[ ] against the interest and harmony of" the union. 401 U.S., at 236 & n.3. The case turned on the validity under § 101 (a)(5) of the Landrum-Griffin Act of the conviction on the second, broader ground.[4]

To determine this issue, *Hardeman* reviewed in detail the legislative history of § 101(a)(5):

> Section 101(a)(5) began life as a floor amendment to S.1555, the Kennedy-Ervin Bill, in the 86th Congress. As proposed by Senator McClellan, and as adopted by the Senate on April 22, 1959, the amendment would have forbidden discipline of union members "except for breach of a published written rule of [the union]," 105 Cong.Rec. 6476, 6492-6493. But this language did not long survive. Two days later, a substitute amendment was offered by Senator Kuchel, who explained that further study of the McClellan amendment had raised "some rather vexing questions." *Id.*, at 6720. The Kuchel substitute, adopted the following day,

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[4] It was assumed by both the majority and the dissent (although not by Justice White, concurring (401 U.S., at 247)) that because the union verdict was general, the undisputed validity of the conviction on the specific assault ground was not relevant to the § 101(a)(5) issue. 401 U.S., at 242; *id.*, at 252 (Douglas, J., dissenting). Thus, petitioner simply ignores the setting of *Hardeman* in suggesting (Petition, at 8) that the existence of a separate union rule on assaults was determinative in that case; if it had been, there would have been no reason for the Court to decide the § 101(a)(5) issue at all.

deleted the requirement that charges be based upon a previously published, written union rule; it transformed Senator McClellan's amendment, in relevant part, into the present language of § 101(a)(5). *Id.*, at 6720, 6727. As so amended, S.1555 passed the Senate on April 25. *Id.*, at 6745. Identical language was adopted by the House, *id.*, at 15884, 15891, and appears in the statute as finally enacted.

The Congress understood that Senator Kuchel's amendment was intended to make substantive changes in Senator McClellan's proposal. Senator Kennedy had specifically objected to the McClellan amendment because

> "In the case of • • • the • • • official who bribed a judge, unless there were a specific prohibition against bribery of judicial officers written into the constitution of the union, then no union could take disciplinary action against [an] officer or member guilty of bribery.
>
> • • •
>
> "It seems to me that we can trust union officers to run their affairs better than that." *Id.*, at 6491.

Senator Kuchel described his substitute as merely providing "the usual reasonable constitutional basis" for union disciplinary proceedings; union members were to have "constitutionally reasonable notice and a reasonable hearing." *Id.*, at 6720. After the Kuchel amendment passed the Senate, Senator Goldwater explained it to the House Committee on Labor and Education as follows:

> "[T]he bill of rights in the Senate bill requires that the union member be served with written specific charges prior to any disciplinary proceedings but it does not require that these charges, to be valid, must be based on activity that the union had

> proscribed prior to the union member having engaged in such activity." Labor-Management Reform Legislation, Hearings before a Joint Subcommittee of the House Committee on Education and Labor, 86th Cong., 1st Sess., pt. 4, p.1595 (1959).
>
> And Senator McClellan's testimony was to the same effect. *Id.*, pt. 5, pp.2235-2236, 2251, 2285.
>
> 401 U.S., at 243 (emphasis supplied).

From this sequence, *Hardeman* concluded that as far as the Landrum-Griffin Act is concerned, "a union may discipline its members for offenses not proscribed by written rules at all." 401 U.S., at 245.[5] Thus, this Court in *Hardeman* answered directly, comprehensively, and with full awareness of the legislative materials the very issue petitioner seeks to present.

2. Petitioner, then, is simply requesting reconsideration of *Hardeman*. The reasons he offers, however, for ignoring basic principles of *stare decisis* fall far short of the compelling showing such a departure requires.

For example, in alluding to "constitutionally reasonable notice," Senator Kuchel was plainly referring to the quite separate notice requirement which *is* included, explicitly, in § 101(a)(5)—namely, the requirement that before a disciplinary hearing, a member must be "served with written specific notice," (§ 101(a)(5)(A)) so that he is not "prejudiced in the presentation of his defense." *Hardeman, supra*, 401 U.S., at 245. Further, the comment of Senator McClel-

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[5] As *Hardeman* noted (401 U.S., at 244 n.11), state law may well provide some form of prior notice protection in union disciplinary proceedings, and the 1959 Congress was so informed.

lan to which petitioner alludes (Petition, at 4-5), occurred during the debate on Senator McClellan's *original* amendment *before* the Kuchel substitute was introduced. That substitute, however, was not designed simply to recast the McClellan amendment in different language. Instead, "[i]t was designed to remove the 'extremes raised by the [McClellan] amendment', 105 Cong. Rec. 6721 (1959), 2 Leg. Hist. 1234 (Sen. Cooper), and to assure that the amendment would not 'unduly harass and obstruct legitimate unionism'. 105 Cong. Rec. 6722 (1959), 2 Leg.Hist. 1233 (Sen. Church)." *Steelworkers v. Sadlowski, supra,* 457 U.S., at 110. The very point of the *Hardeman* analysis of the legislative history of § 101(a)(5) is that the deletion of the language in § 101(a)(5) concerning previously published written union rules *did* represent a conscious Congressional decision to abandon Senator McClellan's concern with the precision of disciplinary provisions, for fear of interfering with "legitimate unionism." Consequently, to "find[] . . . by construction [the] broad policy [for which petitioner argues]" would be unjustifiably to ignore the fact that "those interested in just such a condemnation were unable to secure its embodiment in enacted law." *NLRB v. Drivers Local Union No. 639,* 362 U.S. 274, 290 (1960). This the *Hardeman* Court properly refused to do.

Finally, petitioner's argument studiously ignores the language of § 101(a)(5). That language does not broadly protect union members' right to "due process". Instead, it is limited to assuring three *particular* procedural protections encompassed within the constitutional due process guarantee. Thus, just as "there is absolutely no indication

that Congress intended the scope of § 101(a)(2) to be identical to the scope of the First Amendment . . . [especially in light of the § 101(a)(2)] proviso covering 'reasonable rules'" (*Steelworkers v. Sadlowski, supra,* 457 U.S., at 111, so there is no statutory basis whatever for a general "due process" guarantee, broader than the specific protections contained within § 101(a)(5).[6]

Consequently, there is no basis at all for reopening the Landrum-Griffin Act issue which *Hardeman* settled. The petition should therefore be denied.

3. Petitioner also suggests that "[t]he decision of the Court of Appeals conflicts with the decision of two other courts of appeal" on the meaning of *Hardeman* (Petition, at 9). It is hard to see how this could be the case, in light of the opaque nature of the Court of Appeals disposition of this case.

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[6]It is worth noting that, in any event, this case is one in which the constitutional cases, if applicable, would find adequate prior notice of the conduct proscribed.

The disciplinary rule proscribed in Code 5, § 1(s) of the International Union Constitution is surely no less precise than the rule that civil servants may be dismissed for "such cause as will promote the efficiency of the service," upheld in *Arnett v. Kennedy,* 416 U.S. 134, (1974). *See also Davis v. Williams,* 617 F.2d 1100 (5th Cir.), *cert. denied* 449 U.S. 937 (1980) (a fireman may constitutionally be discharged under a broad rule prohibiting "conduct prejudicial to good order" for publicly criticizing his city's fire chief). And it is at least as much "hardcore" misconduct (Petition, at 5) in the union context for a union member to promote the employment prospects of avowed non-union members as it is in the military context for a soldier to encourage fellow soldiers not to fight (*Parker v. Levy,* 417 U.S. 733, 757 (1974)).

The Courts of Appeals wrote no opinion at all; instead, it confined itself to citing *Hardeman*. Thus, for all that appears, the Fifth Circuit concurred in the Third Circuit's indication in *Semancik v. United Mine Workers*, 466 F.2d 144 (3rd Cir. 1972), that there may be circumstances in which repeated violations of the free speech provisions of the Act would justify invalidating a broad union constitutional provision. *See also Kuebler v. Cleveland Lithographers & Photographers Union Local 24-4*, 473 F.2d 359, 364 (6th Cir. 1973) (reading *Semancik* as limited to circumstances in which because of "repeated violations of the rights of its members . . . freedom of speech is unreasonably affected by . . . a [broad] provision" in a union's constitution, and then agreeing with *Semancik* on the point).[7] For, since the court below necessarily concluded that there was no free speech violation here *at all* (*see* n.3, supra), its disposition would have been the same had it agreed or disagreed with *Semancik*.

Nor is there any basis for inferring from the Fifth Circuit's silence a conflict between that Court and the Ninth Circuit in *Perry v. Milk Drivers' & Dairy Employees' Union, Local 302*, 656 F.2d 539 (9th Cir. 1981). Contrary to the implication in the Petition (at 9), the decision in *Perry*, like the one here, *upheld* a union disciplinary conviction in the face of a claim that the governing constitutional provisions were too vague. Just as in *Perry* "[n]o unreasonable exercise of intellect was required to see that the instigation and maintenance of unauthorized picketing . . .

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[7]Thus, contrary to petitioner's suggestion (Petition, at 9 & n.3), there is no conflict between *Semancik* and *Kuebler*.

constitutes a violation of the International Constitution and an act of disloyalty"[8] (*id.*, at 539), so here "no unreasonable exercise of intellect was required" to see that training non-union workers to compete with union members for employment would be considered seriously detrimental to union interests. Thus, the Fifth Circuit had no reason to disagree with *Perry* in order to reach its result, and there is no indication that it did so.

Since the disposition of this case by the Fifth Circuit is not in conflict with that of any other Court of Appeals, the second ground proffered in support of granting certiorari has no more merit than the first.

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[8]Two of the constitutional provisions attacked in *Perry* proscribed "[v]iolation of any specific provision of the Constitution or failure to perform any of the duties specified thereunder" and "[v]iolation of the oath of loyalty to the Local Union and the International Union." *Id.*, at 538 n.3.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 83-327

In The

Supreme Court of the United States

October Term, 1983

DON HALSELL,

Petitioner,

v.

LOCAL UNION NO. 5, BRICKLAYERS & ALLIED CRAFTSMEN; TEXAS STATE CONFERENCE OF THE BRICKLAYERS & ALLIED CRAFTSMEN; INTERNATIONAL UNION OF BRICKLAYERS & ALLIED CRAFTSMEN,

Respondents

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE TO JURISDICTIONAL STATEMENT

Although jurisdiction has been technically invoked pursuant to 28 U.S.C. § 1254(1), it is Respondents' position, as argued below, that no adequate reason has been shown for the Court to grant certiorari. The decision of the Fifth Circuit is not actually in conflict with decisions of the Supreme Court or any other circuit. The petition for certiorari should therefore be denied.

STATEMENT OF THE CASE

Respondents cannot agree to Petitioner's statement of the case. Therefore, Respondents would submit the following statement of the case:

Halsell, at the time a member for more than twenty-five (25) years of the Bricklayers & Allied Craftsmen ("BAC") was asked in the summer of 1977 to teach a bricklaying class at Skyline High School in Dallas, Texas. The class was sponsored by a group of non-union contractors and the students included employees of the non-union contractors. None of the students were regularly indentured to the international union. Halsell agreed to and in fact did teach the open-shop class.

Article X, § 3, Constitution of the Texas State Conference of Bricklayers specifically prohibits a union member from teaching the trade to persons not regularly indentured to the union's apprenticeship program. Halsell had reviewed and was fully aware of this provision at the time he commenced teaching the open-shop apprenticeship class. He was also aware as a result of numerous conversations that the union was opposed to teaching the trade to non-members of the union.

Shortly after he began teaching the class, Halsell was charged by the Dallas local of the BAC with violation of the International Constitution, Code 5, paragraph 1(s), which states:

> It shall be an offense against the International Union . . . for any member . . .

> to commit any act which is seriously detrimental to the interests of the International.

At his union trial, Halsell pled guilty to the charge and was fined $250.00. Halsell appealed the fine without success to the Texas State Conference of the BAC and to the International, then filed suit in the District Court under 29 U.S.C. § 412. Among other things, he contended that the fine violated § 101(a)(5) of the Act because he did not have reasonable **prior** notice that his conduct — teaching a bricklaying class — could subject him to union discipline.

REASONS FOR DENYING THE WRIT

In his petition, Halsell sets forth two reasons for granting a writ in this case. They will be discussed below.

A. Petitioner's First Reason

For his first reason Petitioner invites the Court to ignore or reverse this Court's well reasoned opinion in *Boilermakers v. Hardeman,* 401 U.S. 233 (1971). There the Court was confronted with the issue of whether a union could discipline a member for conduct not specifically prohibited by the union constitution without violating § 101(a) of the Labor Management Reporting and Disclosure Act of 1959. In holding in the affirmative the Court made two critical statements:

> 1. [A] union may discipline its members for offenses not proscribed by written

> rules at all . . . [so] it is surely a futile exercise for a court to construe the written rules in order to determine whether particular conduct falls within or without their scope. 401 U.S. at 244-45.
>
> 2. [T]he notice [of the charges against Hardeman], appears to have contained a detailed statement of the facts relating to the fight that formed the basis for the disciplinary action. Section 101(a)(5) requires no more. 401 U.S. at 245 (footnote omitted).

Petitioner, understandably distressed by this language, invites the Court to reverse its long standing opinion based on the argument that Congress did not intend to eliminate the requirement of fair prior notice of prohibited conduct. This is an issue which the Court need not reach in this case.

It cannot be emphasized too strongly that this is not a case in which Petitioner was denied fair prior notice of prohibited conduct. The record is conclusive that Halsell was aware, prior to engaging in teaching, that the State Constitution contained a provision which specifically forbade the conduct in which he engaged. The record is also clear that Halsell had been engaged in an ongoing dispute with his union leadership with respect to teaching the trade to non-union apprentices. Based upon this dispute, Halsell knew full well that the union would not tolerate such conduct. Finally, Halsell's claim that he did not know that teaching

open-shop apprentices was wrong is cast into significant doubt by the fact that he continued to do so after being fined for the conduct.

It is clear, therefore, that Petitioner invites the Court to reach an issue which it need not reach to decide this case. The difficult problem of whether Congress intended to relieve unions of the duty to provide prior notice of prohibited conduct in all conceivable circumstances can and should be reserved for another day. Here, Halsell had prior notice and accordingly the Court need not rule on the hypothetical case where he did not.

Even if the Court were to conclude that Halsell did not have actual notice of the prohibited nature of his conduct, his conduct was such that no notice was required. Even under Petitioner's restrictive view of *Hardeman*, a member who engages in "hardcore" conduct may be punished without prior notice. (Petition for Cert. at 6) Assuming, arguendo, that Petitioner's analysis is correct, "hardcore conduct includes not only serious crimes such as rape and murder but matters as trivial as striking a union business agent" (the conduct involved in *Hardeman*). Therefore, a person not entirely naive about union matters could hardly fail to recognize the "hardcore" nature of Halsell's conduct. Indeed, one can hardly imagine conduct as odious to a union as teaching the trade to the very people who are taking jobs from one's union brothers.

B. Petitioner's Second Reason

Petitioner also contends that the Circuit Court's opinion below conflicts with opinions from two other circuits, *Semancik v. United Mine Workers,* 466 F.2d 144, 157 (3d Cir. 1972) and *Perry v. Milk Drivers & Dairy Employees' Union Local 302,* 656 F.2d 536, 539 (9th Cir. 1981). Properly read there is no conflict between these opinions.

Semancik is not contrary to the decision below but rather distinguishable from it. Furthermore, *Semancik* does not pretend to follow *Hardeman.* In distinguishing *Hardeman* the Court wrote:

> [11] While it is beyond the province of the courts to scrutinize whether unions may punish members for particular behavior, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmith, Forgers and Helpers v. Hardeman, 401 U.S. 233, 244-245, 91 S.Ct. 609, 28 L.Ed.2d 10 (1971), the same prohibitions do not apply to actions involving free speech, the cornerstone of all union democracy. Therefore, whenever a union member is to be disciplined for discussing the fitness of union leaders, their policies or their administration, he may claim the protection of the LMRDA's Bill of Rights.

466 F.2d 144 at 153.

It is, therefore, clear that the *Semancik* court is fully prepared to follow *Hardeman* to the same conclusion as the Court below in cases not involv-

ing free speech. In a case such as this, there would be no conflict.

Similary, *Perry* does not conflict with the decision below. To the contrary, after citing *Hardeman,* the *Perry* court reaches the very same conclusion as the Court below. There is therefore no conflict.

CONCLUSION

For the reasons cited above, Petitioner has failed to demonstrate any reason for the Court to grant certiorari in this case. The decision below is consistent with those of the Supreme Court and not in conflict with any circuit. Certiorari should therefore be denied.

Respectfully submitted,

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By: .....
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been mailed to Mr. Stephen F. Fink, 2300 Republic Bank Building, Dallas, Texas 75201, Attorney for Petitioner, on this the 9th 12 day of September, 1983

Steven B. Thorpe

Steven B. Thorpe

1. Opinion of the Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1127

DON HALSELL,

Plaintiff-Appellant,

versus

LOCAL UNION NO. 5, BRICKLAYERS & ALLIED CRAFTSMEN; TEXAS STATE CONFERENCE OF THE BRICKLAYERS & ALLIED CRAFTSMEN; INTERNATIONAL UNION OF BRICKLAYERS & ALLIED CRAFTSMEN,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

(May 5, 1983)

Before CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 21. United Steelworkers of America v. Sadlowski, U.S. , 102 S.Ct. 2339 (1982); International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO v. Hardeman, 401 U.S. 233 (1971).

2. Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DON HALSELL VS. LOCAL UNION NO. 5, BRICKLAYERS & ALLIED CRAFTSMEN; TEXAS STATE CONFERENCE OF THE BRICKLAYERS & ALLIED CRAFTSMEN, and INTERNATIONAL UNION OF BRICKLAYERS & ALLIED CRAFTSMEN	CA3-79-0927-C

OPINION

Plaintiff seeks to protect rights afforded by our federal labor laws, specifically those contained in 29 U.S.C. § 411(a)(1), (2), (4) & (5).[1] Jurisdiction in this Court is founded upon 29 U.S.C. §§ 185(c) and 412.[2]

[1] 29 U.S.C. § 411(a)(1), (2), (4) & (5) read:

(a)(1) Equal rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws. [cont.]

[2] 29 U.S.C. § 185(c) reads:

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Plaintiff is a member in good standing of Local Union No. 6, Bricklayers & Allied Craftsmen. Local 6's parent organizations are Defendants Texas Conference and International.

Though a union bricklayer, Plaintiff has not made his living by laying bricks for about 20 years. He is a brick contractor and Chief Executive Officer of the Brick Institute of Texas.

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[1] [cont.] (2) Freedom of speech and assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(4) Protection of the right to sue.—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against improper disciplinary action.—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Apparently, Plaintiff hires only union bricklayers so he has not had difficulties because he is a brick contractor.

But his position as the head of the Brick Institute of Texas has created problems. The Brick Institute is a trade organization of brick manufacturers. It, of course, wishes to promote the sale and use of brick construction in the State of Texas, regardless of whether the layers are union or non-union.

In August, 1969, Plaintiff, who was then employed by the Brick Institute, got into a dispute with Bricklayers Union Local No. 9 in Waco, Texas, over the training of non-union bricklayer apprentices. This dispute was ultimately settled by the parties while suit was pending in Federal District Court in Waco.

This incident is important presently only because it goes to show that Plaintiff because of his position with the Brick Institute has had differences with his fellow union members for many years.

In the fall of 1977, Plaintiff was approached to help find a teacher for an apprenticeship class at Skyline High School, Dallas, Texas. Plaintiff agreed to help find a teacher and also agreed to fill in as the teacher (for pay) until a permanent instructor could be found. This apprenticeship class was sponsored by an association of open shop contractors.

On November 3, 1977, Mr. William R. Shrum, Business Manager of Defendant Local 5, observed Plaintiff at Skyline High School where he was teaching the open shop class. Mr. Shrum subsequently charged Plaintiff with a violation of Code 5, Code of International Offenses, Paragraph 1(s) of the Constitution of Defendant International. Code 5(1)(s) provides:

> (1) It shall be an offense against the International Union:

> . . . (s) For any member or affiliate to commit any act which is seriously detrimental to the interests of the International.

A trial was subsequently held on November 30, 1977, by Defendant Local No. 5. Just what happened at that trial is subject to dispute but is clear that Plaintiff admitted that he was teaching the open shop apprenticeship class on November 3, 1977. He was found guilty and fined $250. A tape recording of that trial was made but that tape was subsequently erased.

Plaintiff was formally notified of the guilty decision and the fine of $250 in a letter from Mr. Shrum dated December 1, 1977. Plaintiff then paid his fine under protest by a check dated December 15, 1977.

On December 23, 1977, Plaintiff sent a letter to Mr. Y. C. O'Glee, President of Defendant State Conference, that stated that the appeal procedures were not clear to him and asking for guidance. He received his answer in a letter from Mr. O'Glee, dated January 9, 1978, to the financial secretary of Bricklayers Local 6 which was also sent to Plaintiff. That letter informed Plaintiff that he had to pay his fine under protest and appeal within 30 days from his trial date. Though Plaintiff was past the 30-day mark, both Defendant State Conference and Defendant International accepted his appeals, in turn. It goes without saying since this suit was filed that his appeals were denied.

As no appeal had been received within the 30-day period, Mr. Shrum had erased the tape before the appeal was filed. Defendant Local 5 has maintained throughout that Plaintiff never exhausted his union remedies because of his late appeal. This might have been a viable argument had not the other Defendants heard the appeals.

Plaintiff complains that his rights under 29 U.S.C. § 411(a)(5)(C) have been violated because he was not

provided a transcript of his trial. Though it would be best if a transcript were available, there has been no showing of any fault on the part of any Defendant for the failure of Plaintiff to receive a transcript. If anything, the unavailability of a transcript was caused by Plaintiff's confusion as to appeal procedures which are set out in Code 6 of the Constitution of Defendant International.[3]

Plaintiff contends that that hearing was not "a full and fair hearing" as required by 29 U.S.C. § 411(a)(5)(C). There were substantial differences in the accounts of the Defendant Local 5 trial between Plaintiff and the witnesses presented by the Plaintiff [sic]. One of the chief complaints of Plaintiff is that Mr. Shrum was present at the trial. But Code 6(2)(f)(i) of Defendant International requires the presence of the charging party at a subsequent trial.

Plaintiff's real complaint about the conduct of the trial is the same complaint under 29 U.S.C. § 411(a)(5)(A) that he has about the written charge upon which he was tried and his complaint under 29 U.S.C. § 411(a)(2) that his Right of Free Speech has been violated by the Defendants.

Plaintiff has the view (which coincides with the Brick Institute's view) that anyone who shows an interest in bricklaying should be allowed to become a fully trained journeyman bricklayer. This, to say the least, is not the view of his co-unionists. As would seem natural, they believe that the number of bricklayers be limited to ensure full employment for the present bricklayers, whom they prefer to be union bricklayers. With this in mind, the

[3] Code 6(3)(C)(i) provides:

> A charged or charging party wishing to appeal must file a notice of appeal by registered or certified mail within 30 days from a trial body's or appellate body's written notice of decision. A copy of the notice of appeal shall be sent by registered or certified mail to the opposing party.

position of Defendants has been and is that there should only be one apprentice for each three journeymen bricklayers. As a corollary of this, Defendants position is that apprenticeship programs should be run under the union's apprenticeship program so that the graduates will be (1) limited in number and (2) union members.

The testimony of Defendants' witnesses was that union members are not allowed to teach apprenticeship classes that are not sanctioned by the union. Plaintiff disputed this by way of the example of a union member who was teaching a non-union sanctioned bricklaying class in a public high school. Defendants witnesses rebutted that this was not an apprenticeship class which qualified a person to be a bricklayer. This testimony was not substantially rebutted. So Plaintiff's equal rights challenge under 29 U.S.C. § 411(a)(1) must fail.

There was no testimony at the trial before this Court to the effect that this equal rights defense was presented by Plaintiff at Defendant Local 5's trial.

Apparently, when Plaintiff showed up for the union trial, he readily admitted that he had taught the apprenticeship class on November 3, 1977, that was sponsored by an association of open shop contractors and not by the union. There were vast differences in the testimony before the Court as to what then happened at the union trial. But all witnesses were in agreement that no further testimony was taken.

Now, we have come down to the rub in this case. Plaintiff contends that the written charge filed by Mr. Shrum should have spelled out just how his conduct was "seriously detrimental to the interests of the International," and that testimony should have been presented at his union trial which would show the serious detriment to the union. He also contends that this provision of Defendant Union's Constitution is vague and overbroad.

As the Fifth Circuit pointed out in *Davis v. Williams*, 617 F.2d 1100, 1103 (1980), cert. den. 449 U.S. 937, 101 S.Ct. 336, 66 L.Ed.2d 160, vagueness is a due process consideration and overbreadth is a first amendment ground consideration and they do overlap. In *Davis*, the Fifth Circuit found that a review of provisions such as "seriously detrimental to the interests of the International, supra," entails "meticulous analysis and balancing" which that Court preferred to leave to the Supreme Court.[4]

The Supreme Court spoke as to these matters quite clearly in *Boilermakers v. Hardeman*, 401 U.S. 233, 91 S.Ct. 609, 28 L.Ed.2d. 10. The Court said that it was up to the unions, not the Courts, to define the conduct which would lead to disciplinary conduct. In *Hardeman*, the Court approved a charge that specified the provision with which Mr. Hardeman was charged and a statement of the facts of the incident that led to the charge upon which Mr. Hardeman was tried. The Court found that this was all that 29 U.S.C. § 411(a)(5) requires.

Mr. Shrum's charge both recited the provision of Defendant International's Constitution which Shrum was charging Plaintiff had violated and the facts of the incident involved. So the charge was in accord with Federal law.

That leaves us with the question of what testimony had to be presented at Plaintiff's trial for a finding of guilt to be proper. Plaintiff maintains that explicit evidence that would tend to show that his teaching of an open shop apprenticeship class was "seriously detrimental" to the interests of Defendant International. Defendants demur. Here we are back to Plaintiff's long standing dispute with his co-unionists.

It is apparent from reading the Supreme Court's opinion in *Hardeman*, supra, that no evidence was presented at

[4] Supra, p. 1104.

Mr. Hardeman's union trial other than testimony concerning the facts and circumstances of the incident involved. This would seem to be true in the usual case and ordinarily end our inquiry.

In the present case, Plaintiff has raised a free speech claim under 29 U.S.C. § 411(a)(2). His claim is, essentially, that the charge trial and $250 fine have been used in an attempt to silence what he considers to be his opposition to the viewpoint espoused by the part of his union that is in control of the union offices. The Court will not, on the whole, get into this squabble. Plaintiff does not claim that any officer of any local, Defendant Conference or Defendant International was not duly elected. So the only assumption that can be made is that the officers speak for the membership.

Plaintiff's contention is not so much that he did not know that the Defendants would look upon his teaching an open shop apprenticeship class with such disfavor as it is that he disagrees with their position and has the right to espouse his disagreement.

Undoubtedly, he has a right to voice his opinions either verbally, in writing or through symbolic acts.

The Fifth Circuit has held that the free speech rights of union members may be limited in three ways. Those three are:

> (1) Reasonable rules pertaining to conduct of meetings; (2) reasonable rules as to the responsibility of every member toward the union as an institution; and (3) reasonable rules requiring members to refrain from conduct interfering with the union's performance of its legal contractual obligations.[1]

The second listed limitation is the one pertinent to our inquiry.

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[1] *Airline Maintenance Lodge 702, I.A.M. & A.W. v. Loudermilk*, 444 F.2d 719, 721 (1971).

Airline Maintenance Lodge 702 v. Loudermilk,[6] is the case cited by Plaintiff that is the closest to his own situation as far as "reasonable rules" go.

In *Airline Maintenance Lodge 702 v. Loudermilk*, the union had fined Mr. Loudermilk for joining and becoming president of a rival union. The Fifth Circuit said that this was improper though the union could have legally expelled him. Mr. Loudermilk's situation was that he was an employee of an airline which had a union shop agreement with the union that had fined him. The union shop provision of that contract was allowed by § 2 Eleventh of the Railway Labor Act, 45 U.S.C. § 152 Eleventh.[7] The Fifth Circuit's reasoning was that Mr. Loudermilk had been compelled to join Airline Maintenance Lodge 702 which he was trying to replace with another union and that this had free speech overtones so the fine was improper. The difference between the fine imposed and the expulsion that could have been imposed was the last part of § 2 Eleventh which says, in essence, that Mr. Loudermilk could have kept his job with the airline if he had been

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[6] Ibid.

[7] 2. Eleventh. Notwithstanding any other provisions of this chapter, * * * any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of employment, that within sixty days following the beginning of such employment * * * all employees shall become members of the labor organization representing their craft or class: *Provided*, that no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employees to tender periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

expelled for joining another union and becoming its president. So explusion would have harmed him not, where the fine harmed him economically.

Plaintiff's situation is far different. He does not lay bricks for a living. There is no showing that the Brick Institute of Texas requires him to be a member of any union, let alone Defendant International. No evidence has been presented that Plaintiff's entry into the union was anything other than completely voluntary. Lastly, Plaintiff is a resident of a "Right to Work" state[1] and not covered by a law such as the Railway Labor Act, 45 U.S.C.A. § 152 Eleventh which allows union shops.

This lack of coercive membership tips the balance in favor of the Defendants. Plaintiff's conduct in teaching the open shop apprenticeship class may have had some free speech elements in it. But there has been no showing that Plaintiff undertook to teach that class for any reason other than to maintain good relations with members of the industry because of his position with the Brick Institute of Texas.[2]

In summation, procedurally, Plaintiff's union trial could have been handled better by Defendant Local 5. Assumably, a new trial could be ordered to clear up any inadequacies in procedure. But in light of the burdens of going forward with evidence and proof that are required and Plaintiff's willing admission to have taught the open shop apprenticeship class as charged, the result would not differ. Therefore, judgment will be entered for the Defendants.

/s/ W. M. TAYLOR, JR.
United States District Judge

DATE: January 28, 1982

[1] Vernon's Ann. Civ. St. Art. 5207a.

[2] Apparently, Plaintiff was paid for teaching the class but did not appear to be much of a motivation as Plaintiff was only supposed to teach until another qualified instructor was found.

3. Order on Petition for Panel Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1127

DON HALSELL,

Plaintiff-Appellant,

versus

LOCAL UNION NO. 5
BRICKLAYERS & ALLIED CRAFTSMEN, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(June 1, 1983)

Before CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ CHARLES CLARK
Chief Judge